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Supreme Court, U.S.
FILED
JUN 28 2001
OFFICE OF THE CLERK

No. 00-1729

In The

# Supreme Court of the United States

ANN BOGREN,

*Petitioner,*

v.

STATE OF MINNESOTA; DEPARTMENT OF PUBLIC SAFETY; DONALD DAVIS, Commissioner of the Department of Public Safety, in his official capacity; MINNESOTA STATE PATROL; ANN BEERS, Chief of the State Patrol in her official capacity;

LIEUTENANT THOMAS FRASER of the State Patrol, personally and individually; LIEUTENANT LORI HODAPP of the State Patrol, personally and individually; and LIEUTENANT COLONEL STEPHEN MENGELKOCH of the State Patrol, personally and individually,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENTS STATE OF MINNESOTA, DEPARTMENT OF PUBLIC SAFETY AND MENGELKOCH

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## STATEMENT OF THE CASE

On March 10, 1998, Petitioner Ann Bogren ("Petitioner" or "Bogren") served and filed her Complaint on her former employer, State of Minnesota, ("State" or "Respondent") Department of Public Safety, and Public Safety officials in their individual capacity,[1] alleging race and gender discrimination, and retaliation under Title VII of the Civil Rights Act of 1964, as amended. Specifically, Bogren claimed that the State terminated her as a State Trooper on account of race and gender. Bogren served Respondent with an Amended Complaint, unsigned, on November 25, 1998.

On May 19, 1999, the State moved for summary judgment on all claims. By Memorandum Opinion and Order dated August 13, 1999, the court granted the State's motion, holding that Bogren failed to sustain her burden of showing that the employer's proffered reasons for her discharge were a pretext for discrimination. Bogren served and filed her Notice of Appeal in a timely fashion on September 13, 1999 and the appeal was briefed on schedule. The oral argument was heard on June 16, 2000. On December 22, 2000 a Panel of the Eighth Circuit Court of Appeals filed its unanimous decision affirming the district court. The Court of Appeals denied Petitioner's Petition for *En Banc* Review on February 15, 2001.

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[1] Of the Public Safety officials sued in their individual capacities, the undersigned represents only Lt. Col. Steven Mengelkoch. The others, Lt. Thomas Fraser and Lt. Lori Hodapp, are separately represented.

## STATEMENT OF FACTS

Petitioner Ann Bogren entered the Minnesota State Trooper Academy via the Peace Officers Career Opportunity Program ("POCOP") in June 1994. This program was designed and administered by the law enforcement community specifically in an effort to recruit non-traditional applicants, including women and minorities. Lt. Mark Peterson Aff. at ¶ 4, RA 2.[2] Bogren is an African-American female. POCOP provided an opportunity to recruit individuals who were not yet licensed peace officers, train them free of charge for licensure, and then send them, in Bogren's case, to the State Patrol Training Academy. *Id.*, RA 2.

Bogren completed a 22 week skills course through the POCOP program during the summer and early fall of 1994. *Id.*, ¶ 10, RA 3. In November 1994, she began the 15 week State Patrol Training Academy. *Id.*, ¶ 11, RA 3. In response to a February, 1995, complaint of gender harassment by two other cadets, the Department of Public Safety and the State Patrol immediately initiated an investigation into the environment at the Training Academy at that time. Thelma James Aff. at ¶ 3, RA 14. Ms. Bogren was interviewed during this investigation and in that interview, she did not identify any harassing or discriminatory actions by members of the State Patrol against her. *Id.*, at ¶ 10, RA 15. In fact, *none* of the cadets interviewed identified any conduct which they found

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[2] Reference to Respondent's Appendix are designated as RA ___.

discriminatory based on race, gender or any other basis. *Id.*, at Ex. F, p. 4, RA 33.

Bogren completed the Training Academy, graduating 23rd out of 27 cadets, was sworn in as a Minnesota State Trooper on February 25, 1995, and began her mandatory one-year probationary period. Petitioner's App. at 82. After additional training in the field, the State Patrol assigned Bogren a squad car and she, like all other probationary troopers, started on solo patrol. On October 23, 1995, a Columbia Heights police officer issued a citation to Bogren for misdemeanor criminal damage to property involving her former boyfriend. Bogren Dep. Ex. 23, RA 40-41. On November 15, 1995, Bogren pleaded guilty to the reduced charge of petty misdemeanor criminal damage to property. Bogren Dep. p. 108, RA 39. According to the police reports, on October 22, 1995, at 11:18 p.m., Columbia Heights Police Officer William Schmidt responded to a call from 5029 6th Street, Columbia Heights, Minnesota, the home of Steve Johnson, regarding an incident reported by Johnson. Subsequently, Officer Schmidt questioned Bogren by telephone. Officer Schmidt's report indicates that Bogren admitted that she was at Mr. Johnson's house, they argued, and she "threw down four Oriental 'items' that she had bought him." Officer Schmidt charged Bogren with criminal damage to property in violation of Minn. Stat. § 609.595; and also advised Johnson on how to obtain a restraining order. *Id.*, Dep. Ex. 23, RA 40-41.

In addition to calling the police, Johnson also called the Minnesota State Patrol, just after midnight on October 23, 1995, and reported Ms. Bogren's conduct. Johnson's message was forwarded to Lt. Fraser because he was the

supervisor on duty. After Lt. Fraser reached Johnson by telephone, he took an initial statement from Johnson and he also spoke with the Columbia Heights Police Department. Fraser Dep. at pp. 77-78, RA 78. Lt. Fraser also obtained the Columbia Heights police report and subsequently took a taped statement from Johnson. Lt. Fraser provided this information to his supervisor, Captain Steven Mengelkoch. *Id.*, at pp. 96-98, RA 79-80.

Based on this information and according to standard procedure, Captain Mengelkoch filed a complaint on October 26, 1995, with the Department of Public Safety Internal Affairs Division. He reported that Bogren engaged in conduct unbecoming an officer.[3] Captain Mengelkoch met with Bogren to discuss the internal procedure following her criminal charges. He informed Bogren that the Internal Affairs Office would conduct an investigation. He also informed Bogren that she should have no contact with Johnson. Mengelkoch Dep. pp. 18-19, 25, RA 89-90.

After receiving the complaint, the Internal Affairs Division referred the case back to Captain Mengelkoch for investigation and he appointed Lt. Fraser as a temporary investigator to complete the investigation into the complaint because Fraser had taken the initial citizen complaint. Fraser Dep. at pp. 96-98, RA 79-80. Lt. Fraser conducted the investigation in accordance with all applicable policies. On November 1, 1995, Lt. Fraser took taped statements from Johnson and Monica Halmon, a

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[3] Bogren took an oath "[t]o conduct [her]self at all times in accordance with the highest moral standards and never commit any act that will reflect discredit on the Minnesota State Patrol or any member thereof." Bogren Dep. 3/26/99, Ex. 30, RA 87.

witness to the incident. *Id.*, pp. 72, 127, RA 77, 81. Lt. Fraser also met with Bogren and her attorney, Joseph Marshall, and took her taped statement. *Id.*, p. 126, RA 81. Bogren also submitted a supplemental statement. Bogren Dep. Ex. 25, RA 70-75.

Based on his interview of Bogren, Lt. Fraser concluded that she was untruthful and evasive. Fraser Dep. Ex. 46, RA 82. Lt. Fraser's opinion is based on Bogren's responses to questions about her anger management counseling[4] and the status of her relationship with Johnson.[5] Accordingly, on November 3, 1995, the Internal

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[4] Initially, Bogren denied that she had ever sought anger management counseling.

TF: Do you know a female psychologist on the 3rd Floor of the Group Health Building on 27th and University [who] is an anger counselor?

AB: No.

Bogren Interview Transcript, Dep. Ex. 25, pp. 10-11, RA 51-52. After Ms. Bogren conferred with her attorney and Lt. Fraser redefined "anger counseling" as "seeing a counselor at anytime who specialized in anger or some how deals with it," Ms. Bogren stated: "In 1994, August 30th I went to an office on 27th and University and spoke with Sandra Neil and based on the profession that I was about to undertake at that time I was in the POCOP program, I requested of her to teach me effective ways of dealing with anger." *Id.*, at pp. 11-12, RA 52-53.

[5] AB: I'm not aware of anything happening approximately eight weeks ago that was a break up.

TF: So you don't consider yourself, for the last 8 weeks you consider yourself still a couple?

AB: No, um I considered us two individuals that had problems and had mutually decided to attempt work on our problem, exclusive of other male or females on each side, so we were like separated. *Id.*, at p. 24, RA 65; *see also Id.*, at p. 2, RA 43.

Affairs Division sustained the charges against Bogren. Fraser Dep. Ex. 46, RA 82. Eventually, Bogren pleaded guilty to petty misdemeanor criminal damage to property.

Subsequently, then Patrol Chief Michael Chabries made the initial decision to non-certify Bogren's appointment to the State Patrol. However, after being informed of the decision on November 8, 1995, Bogren's legal representative, Joseph Marshall, requested that the Patrol hold off non-certifying Ms. Bogren until he had a chance to look into the case before he advised his client on what to do. Mengelkoch Dep. at p. 28, RA 90. This request was granted. A meeting was then arranged on November 14, 1995, in which Mr. Marshall had an opportunity to meet with the union, as well as with Deputy Chief Halverson, to provide any information that may have a bearing on Bogren's situation and possibly change the decision. *Id.*, RA 90.

The decision to non-certify Bogren was based upon several deficiencies culminating in the incident involving her former boyfriend. In the opinion of Patrol supervisors, Bogren displayed inadequate skills during her field training. Initially, Bogren displayed difficulty in paying attention to traffic lights and stop signs; Trooper Polansky concluded that Bogren was unable to divide her attention among operating the squad car, listening to the radio, knowing where she was in relation to her partner, and monitoring traffic violations. Brian Polansky Aff. at ¶ 16, RA 93-94. During the last phase of training, Trooper Polansky noticed a regression, rather than improvement, in Bogren's driving. *Id.*, at ¶ 28, RA 96. Bogren violated traffic laws almost daily, including speeding unlawfully

and unnecessarily through residential neighborhoods, following other drivers too closely and failing to stop at stop signs and red metering lights. Bogren's driving raised concerns for her safety, the safety of her partners, the safety of the motoring public and the safety of pedestrians. *Id.*, at ¶¶ 22-25; 27 & 33, RA 94-97.

Bogren's poor driving was viewed as a serious problem. In addition to documenting Bogren's daily traffic violations, Trooper Polansky indicated on the final field training report that Bogren was "experiencing difficulty" with regard to her driving ability. Polansky Dep. Ex. 35, RA 100-101. Also, Trooper Polansky reported to Lt. Kutz that he was concerned about Bogren's driving, including excessive speed, driving through stop signs and lights, following too closely, and making unsafe lane changes. Al Kutz Aff. at ¶ 5, RA 103. Trooper Polansky recommended to Captain Mengelkoch and the Field Training Lieutenants that Bogren drive with another field training officer so that another trooper could observe her driving problems and offer remedial advice to correct this serious deficiency. Brian Polansky Aff., at ¶ 33, RA 97.

As documented in Lt. Kutz's "Supervisors Report of Trooper Contact" dated June 9, 1995, the Minnesota State Patrol was concerned because Bogren attempted to cover up an accident, rather than report it as policy required. Al Kutz Aff. at ¶ 9. RA 104. On approximately June 2, 1995, Lt. Dan Hilligoss notified Lt. Kutz that Bogren had been involved in an accident on May 24, 1995. *Id.*, ¶ 8, RA 104.

Trooper Beth Zeller informed Lt. Hilligoss, the lieutenant on duty, that "he might hear a different version of the accident from [Bogren] than the report that she

[Zeller] was going to submit." *Id.*, Ex. B, RA 107. Lt. Kutz interviewed Trooper Zeller and discovered that she heard Bogren contact the Department of Transportation to report a downed metering ramp light. *Id.*, at ¶ 10, RA 104. Trooper Zeller later observed Bogren parked next to the metering ramp light and asked her how it had been knocked down. *Id.*, RA 104. Bogren reported that she hit the light and Trooper Zeller informed her that she should file an accident report. *Id.* Trooper Zeller further relayed that she had to convince Bogren to file a report and that Bogren was unhappy about it. *Id.*

Based upon discussions with her supervisors with regard to her performance and the October 22, 1995, incident, Chabries affirmed his earlier decision to terminate Bogren. Michael Chabries Aff. at ¶ 3, RA 114.

## ARGUMENT

### I. Petitioner Failed To Raise The Issue Of The Evidentiary Effect Of An EEOC Letter At The Court Of Appeals And, Therefore, This Issue Has Not Been Preserved For Review By Certiorari.

Petitioner argues that an opinion letter from the local Equal Employment Opportunity Commission ("EEOC") agency should have been considered by the lower court in its determination of whether Petitioner had identified sufficient facts to survive a summary judgment motion. Petition at 8-13. Because Petitioner did not preserve this

issue by raising it either in the district court[6] or before the Court of Appeals, she has waived the issue and certiorari should not issue. *Sonzinsky v. U.S.*, 300 U.S. 506 (1937).

Even had Petitioner raised this issue, the court would have been correct to refuse to consider the EEOC letter as evidence. A review of the letter reveals that it is not probative in any way. The letter simply announces the signer's conclusion that Petitioner was discharged and subjected to a hostile work environment in violation of Title VII. Petitioner's App. A-39-40. The letter contains no discussion of evidence or law that would show that the decision had a factual and legal basis. Given these limitations, a court should refuse to consider the EEOC's determination as evidence. *See Goldberg v. B Green Co., Inc.*, 836 F.2d 845 (4th Cir. 1988) (holding that conclusory EEOC letter was insufficient to create genuine dispute of material fact).

## II. The Court Of Appeals Properly Applied The Law In Affirming The District Court's Dismissal Of Petitioner's Case On Motion For Summary Judgment.

### A. The Court Of Appeals Properly Analyzed The Facts And The Law According To Precedent.

Petitioner argues that the Court of Appeals did not follow the mandate of the Court in *Reeves v. Sanderson*,

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[6] The opinion letter was identified and quoted in the "Facts" portion of Petitioner's district court Memorandum in Opposition to Summary Judgment, but the legal issue was not advanced to the district court.

___ U.S. ___, 120 S. Ct. 2097 (2000) by failing to give appropriate credence to plaintiff's evidence[7] and by not disregarding colorable evidence of the defendant. Petition at 14. The gravamen of Petitioner's argument for this issue, however, is not based upon *Reeves*, but rather represents a compendium of what the Petitioner believes are errors by the Panel. With respect to Petitioner's "omnibus" argument, the decision of the Panel shows that at every stage of the burden-shifting analysis the Court of Appeals properly analyzed the evidence in the record, and carefully considered each of Petitioner's arguments.

### B. The Determination Of The EEOC Was Not Argued To The Court Of Appeals.

Petitioner contends that the Panel ignored the determination of the EEOC. Petition at 17. As discussed in Part I, *supra*, this argument was not submitted to the Panel. Since the issue was not preserved, the Court should not address it.

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[7] Respondent is not waiving its right to object that facts identified in the Petition are not based upon admissible evidence. For example, Petitioner contends that the officer who investigated the criminal incident involving her former boyfriend had made statements about the Chief of the State Patrol. Petition at 18. Based upon the record before the Court of Appeals, these statements are not based upon admissible evidence.

### C. Alleged Misrepresentation To The EEOC Was Not Argued To The Court of Appeals.

Petitioner argues that the Panel "failed to consider" an alleged misrepresentation to the EEOC as evidence of pretext. Petition at 17. Again, Petitioner failed to preserve this by raising it with the Court of Appeals. Since the issue was not preserved, the Court should not consider it.

### D. The Panel Did Not Ignore Petitioner's Evidence Of Alleged Pattern Of Discriminatory Practice.

Petitioner argues that the Panel "ignored" her evidence of an alleged policy of discrimination. Petition at 18. The Panel's decision fully explored the "simplistic demographic evidence" which Petitioner proffered in an attempt to satisfy her pretext burden and discounted this evidence in conformance with established legal authority. Decision at 11, Petitioner's App. A-13.

### E. The Panel Properly Concluded That Petitioner Failed To Show Pretext.

Petitioner argues that the Panel failed to consider evidence that alleged deficiencies in her performance were untrue. Petition at 20. The Panel considered Petitioner's argument that the supervisor's report contained "blatant lies and inaccuracies" and rejected her contentions. Petition A-12. The court stated:

> For the most part, the supervisors' report merely presents issues and concerns raised by other troopers during Bogren's probationary period, which are supported by the record, and summarizes the tea-cup incident at Johnson's

> home. We find no evidence supporting Bogren's assertion that the report contains blatant lies, included by her supervisors to justify her termination, nor any evidence related to the report's preparation which would cause a fact finder to question the explanation offered by the state.

In support of the Panel's reasoning and conclusion, it should be noted that Petitioner failed to offer evidence that the decision-maker, Colonel Chabries, was motivated by discriminatory animus. That is, Petitioner attributed none of the alleged lies or distortions to the actual decision-maker.[8] In addition, since there is a factual basis for the conclusion reached by the decision-maker, an attempt by Petitioner to litigate whether the infraction occurred is an invalid method for showing pretext. *Gill v. Reorganized School Dist.*, 32 F.3d 376, 379 (8th Cir. 1994). In addition, much of her argument appears to simply question the wisdom or soundness of the termination decision. Again, such an argument is irrelevant to the pretext analysis. *Davenport v. Riverview Gardens*, 30 F.3d 940, 944 (8th Cir. 1994).

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[8] For this reason Petitioner's reliance on *Keathley v. Ameritech Corp.*, 187 F.3d 915 (8th Cir. 1999) is misplaced. The *Keathley* Court correctly held that plaintiff had shown that the proffered reasons were not the actual reasons because, *inter alia*, similarly situated, non-protected class employees were treated differently and because the *decision-maker* had manifestly lied. *Id.*, 187 F.3d at 924.

### F. The Panel Appropriately Considered Petitioner's Arguments With Respect To Disparate Treatment Of Comparable Non-Protected Class Employees.

Petitioner argues that the Panel "gave no weight" to Petitioner's comparison evidence. Petition at 25. The decision, however, shows that the Panel carefully analyzed the Petitioner's proffered evidence on this question. For example, the Panel carefully explained why non-probationary State Troopers were not, as a matter of law, similarly situated with the Petitioner, a probationary trooper. Decision at 8, Petitioner's App. A-10.

The Panel also properly and carefully analyzed Petitioner's proffered evidence with respect to probationary troopers. The Panel stated:

> We respectfully disagree with the district court's conclusion that Bogren only compared herself to nonprobationary troopers. On appeal, Bogren presents scant evidence that the patrol did not discipline several white male probationary officers when citizen complaints were lodged against the troopers or when disciplinary issues arose. The same probationary officers were also identified in Bogren's response to the state's memorandum in support of summary judgment. The state argues, and we agree, however, that the probationary-trooper evidence offered by Bogren is insufficient to establish pretext. "To be probative evidence of pretext, the misconduct of more leniently disciplined employees must be of 'comparable seriousness.' " *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994) (quoting *Lanear v. Safeway Grocery*, 843 F.2d 298, 301 (8th Cir. 1988)). Bogren presents no evidence

> that any of the probationary officers ever received a comparable criminal citation nor that concerns over their accountability, driving performance or tendency to prevaricate were raised during their probationary period. Nor does she show that they were involved in motor vehicle accidents while on patrol. Rather, the record reflects only that two probationary troopers received a single citizen complaint, both of which were investigated and found to be unsustained, and a third received two citizen complaints. Moreover, Bogren has not shown that the supervisor or supervisors responsible for her termination were also involved in the disciplinary action, or lack thereof, of the white male probationary officers. *See id.* (recognizing that individuals are generally not similarly situated when different decision makers are involved in the respective disciplinary action).

It should be noted that the State also produced evidence showing that probationary troopers were discharged for comparatively similar infractions. For example, Probationary Trooper Robert Starzl, a white male, was non-certified because he criticized the Patrol at a fishing contest dinner where members of other law enforcement entities were present. Anne Beers Aff. at 8, RA 123. Another example of this is Probationary Trooper David Hutchins, another white male. The culminating event for Hutchins' termination was his utilization of a paper clip as a tie bar. *Id.*, at 7, RA 122.

## CONCLUSION

For all of the reasons described above, Petitioner respectfully requests that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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